

	<a href="#">Link to Final Agency Decision</a>
	OAH Docket No. 2-1201-17498-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF  
EMPLOYMENT AND ECONOMIC DEVELOPMENT  
STATE SERVICE FOR THE BLIND

In the Matter of the Appeal of Frank Holder	<b>FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION</b>
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This matter came on for hearing before Administrative Law Judge Raymond R. Krause (the ALJ) commencing at 9:20 a.m. on January 24, 2007, at the offices of the State Services for the Blind, 2200 University Avenue West, Suite 240, St. Paul, Minnesota. The record closed the same day.

Tricia Matzek, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul Minnesota 55101, appeared on behalf of the State Services for the Blind (SSB). Frank Holder (Respondent), 3535 Clinton Avenue South, Minneapolis, Minnesota 55408, was not represented by counsel but was accompanied by and represented by his wife Teresa Charles.

### STATEMENT OF THE ISSUES

1. Did SSB show good cause when it terminated Respondent's license for failure to operate according to Minn. R. 3321.0100 to 3321.1400, the operator agreement, the Corrective Action Plan, and the terms and conditions of the licensing agency's permit to operate in the Bishop Whipple Federal Building?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

### FINDINGS OF FACT

1. Respondent is legally blind and qualifies for the opportunity to operate a vending stand under the Business Enterprises Program (BEP). The BEP is operated by and managed by SSB.

2. On September 2, 1997, SSB and Respondent entered into an agreement for Respondent to operate Stand #97 at the Bishop Henry Whipple Federal Building at Fort Snelling (the Initial Contract). The Initial Contract requires a number of things from the stand operator in exchange for the right to operate the stand. The operator agrees to undertake in relevant part:

“1(a) To devote his best energies and full time to the conduct of this business and to notify the State Licensing Agency in case of sickness or inability to continue...

1(d) To conduct the business at all times in accordance with Rules To Govern All Vending Stands and Business Enterprises of the State Licensing Agency, Minnesota Rules Chapter 3321, which are incorporated by reference, and made part of this contract;

1(e) To conduct the business in accordance with the permit or contract granting the State Licensing Agency the authority to establish this vending stand, see attachment(s) A, B, & C which is incorporated by reference, and made part of this contract;...”<sup>1</sup>

3. During the course of the next three years, problems arose with Respondent’s compliance with the contract. In 2000, the SSB moved to terminate Respondent’s license to operate Stand #97. An informal administrative hearing was held and the matter was noticed for a hearing with the Office of Administrative Hearings. Prior to the formal hearing, the matter was settled after an agreement was reached between the SSB and Respondent. Respondent was, at that time, represented by counsel.<sup>2</sup>

4. The agreement between Respondent and SSB was memorialized in the form of a settlement agreement (the 2000 Settlement Agreement) signed by both parties and dated October 19, 2000. The terms of this agreement specified that the Respondent agreed, among other requirements, to furnish timely monthly reports<sup>3</sup> and pay a monthly operating charge based on Minn. R. 3321.0800, subp. 1, by the 25<sup>th</sup> of each month<sup>4</sup> or be in default. The 2000 Settlement Agreement required Respondent to maintain, at all times, specified amounts of product in the machines at his vending stands.<sup>5</sup> It required Respondent to pay off the Monthly Operating Charges that he owed SSB according to a specific payment plan.<sup>6</sup> The Respondent was also required by

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<sup>1</sup> Exhibit 1A.

<sup>2</sup> Testimony of S. Nichol, Tape 1.

<sup>3</sup> Ex. 1, para. 2.

<sup>4</sup> Ex. 1, para. 3.

<sup>5</sup> Ex. 1, para. 5.

<sup>6</sup> Ex 1, para. 6.

terms of the 2000 Settlement Agreement to pay his initial inventory debt to SSB according to a payment schedule contained therein.<sup>7</sup>

5. The 2000 Settlement Agreement's term was for two years or until Respondent paid in full the two debts owed to SSB, whichever was longer. Also under the terms, Respondent agreed that failure to comply with the requirements of the 2000 Settlement Agreement would result in immediate termination of Respondent's license and that Respondent would waive his appeal rights upon such termination.<sup>8</sup>

6. SSB continued to receive complaints about the maintenance of Stand #97 from the U.S. General Services Administration (GSA) which manages the building in which Stand #97 is located. The complaints were that the vending machines were not cleaned properly or regularly, that there was little or no product in the machines, that there was expired or spoiled food in the machines, that machines were not working and not repaired within a reasonable period. SSB informed Respondent of the nature of these complaints.<sup>9</sup>

7. SSB continued to have problems getting Respondent to comply with accurate and timely record keeping and delivery of ledgers to SSB. SSB repeatedly notified Respondent of these violations of the 2000 Settlement Agreement.<sup>10</sup>

8. Numerous attempts to communicate with Respondent were made by SSB in an effort to obtain compliance with the terms of the agreements. Meetings which were arranged for this purpose were cancelled by Respondent and phone calls were repeatedly not returned.<sup>11</sup>

9. Notwithstanding Respondent's failure to comply with the terms of the 2000 Settlement Agreement, in December of 2005, SSB preferred a Corrective Action Plan to immediately terminating Respondent's license. On December 12, 2005, SSB and Respondent agreed to a Corrective Action Plan (the CAP). In the CAP, Respondent again agreed to comply with the 2000 Settlement Agreement, to meet the standards used in other corrective action plans for keeping vending machines full, to comply with the operating standards for bookkeeping established by the Operator Management Committee, and to provide proof of paying sales tax.<sup>12</sup>

10. In an effort to assist Respondent in his compliance, SSB provided various training opportunities for Respondent and sometimes for his

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<sup>7</sup> Ex. 1, para. 7.

<sup>8</sup> Ex. 1, paragraphs 8 and 9.

<sup>9</sup> Exs. 10, 11, 12, 13, 14, 15, 15A, and 16.

<sup>10</sup> Exs. 3A, 3, 4, 5, 6, 7, and 8.

<sup>11</sup> Exs. 17 and 18.

<sup>12</sup> Ex. 2.

employees.<sup>13</sup> In addition, SSB offered to put Respondent in touch with someone who would clean his machines for him if he felt unable to do so himself.<sup>14</sup> Respondent did not choose to take advantage of that offer.<sup>15</sup> SSB refused, however, to provide training on cleaning the coffee machines to Respondent's employee.<sup>16</sup> Mr. Stanley Nichol, Supervisor of the BEP, stated that SSB does not have the resources to train all employees of all stand operators in all facets of maintenance of the multitude of machines they operate. SSB's policy is, therefore, to provide training only to the named operator.<sup>17</sup>

11. Respondent requested, on several occasions, permission to access a janitor's closet in the Whipple Building so that adequate cleaning of various machine parts could be accomplished. SSB passed that request on to GSA. Despite passage of over one year, the request has not been acknowledged or granted.<sup>18</sup>

12. Despite efforts to train Respondent, SSB continued to receive complaints from GSA regarding the cleanliness and lack of refilling of the machines at Stand #97.<sup>19</sup>

13. On August 11, 2006, SSB advised Respondent that, as a result of continued non-compliance, Respondent's license was being revoked immediately.<sup>20</sup>

14. In a letter dated August 21, 2006, Respondent wrote to the Governor regarding his license revocation.<sup>21</sup> SSB took this letter as an appeal from their determination and requested a hearing before an Administrative Law Judge.<sup>22</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. SSB and the ALJ are authorized to hear this matter pursuant to Minn. Stat. §§248.07, subd. 15 and 14.50 and Minn. R. 3321.1200, subp. 3.

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<sup>13</sup> Ex. 21A, 21, Test. of S. Nichol, Tape 2, side 2.

<sup>14</sup> Ex. 21.

<sup>15</sup> Test. of S. Nichol, Tape 2, side 2.

<sup>16</sup> Test. of S. Nichol, Test. T. Charles, Tape 3.

<sup>17</sup> Test. of S. Nichol, Tape 3.

<sup>18</sup> Id.

<sup>19</sup> Ex. 22, 23, 24, 28, 29, and 33.

<sup>20</sup> Ex. 25.

<sup>21</sup> Ex. A.

<sup>22</sup> Exs. 26 and 27.

2. Respondent received due, proper and timely notice of the time and place of the hearing. The SSB has complied with all relevant procedural notice requirements. This matter is, therefore, properly before the SSB and the ALJ.

3. Respondent has the burden to prove, by a preponderance of the evidence, that he has complied with the terms of the various agreements and applicable rules and that the SSB has not shown good cause for his license to be revoked.

4. Respondent has not shown, by a preponderance of the evidence, that he has complied with paragraphs 1(a), 1(d), or 1(e) of the Initial Contract, paragraphs 2, 3, 5, 6, or 7 of the 2000 Settlement Agreement, or any requirements of the Corrective Action Plan.

5. Respondent is in violation of Minn. R. 3321.0700, subp. 1, Minn. R. 3321.0800, subps. 2 and 4, and Minn. R. 3321.1000, subps. 2A through 2D.

6. Respondent is in default as that term is defined in each of the applicable agreements.

7. Because Respondent's actions and omissions have the potential to damage the operation, integrity, and reputation of the BEP, revocation of the agreement between Respondent and SSB is warranted under Minn. R. 3321.0500, subp. 2.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

Based upon these Conclusions, the Administrative Law Judge recommends that: The determination by the SSB that Respondent's license is immediately revoked be AFFIRMED.

Dated: February 2, 2007

s/Raymond R. Krause

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RAYMOND R. KRAUSE  
Administrative Law Judge

Reported: Taped, 4 tapes  
No transcript prepared

## **NOTICE**

This report is a recommendation, not a final decision. The Director of the State Services for the Blind will make the final decision after a review of the record. The Director may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Director shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Director. Parties should contact Cathy Carlson, Director, Administrative Services, State Services for the Blind 2200 University Ave. West, St. Paul, Minnesota, to learn the procedure for filing exceptions or presenting argument.

If the Director fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Director must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

## **MEMORANDUM**

### **Background**

The Minnesota State Services for the Blind is a Division of the Department of Employment and Economic Development. Among the programs provided by SSB is the Business Enterprise Program. The BEP, among other things, provides business opportunities to individuals who are legally blind. One of these opportunities is to operate vending stands in various state and federal buildings throughout the state.

The BEP and the operator sign an agreement that governs the terms of the business arrangement. If the operator does not comply with the terms of the agreement, SSB may take corrective action, up to and including, revocation of the operator's license to operate a vending stand through the program.

In this case, Respondent signed an Initial Contract in 1997 for Stand #97 in the Whipple Federal Building at Fort Snelling. The Initial Contract set forth various responsibilities of the operator. Apparently, Respondent was having difficulty complying with the terms of the Initial Contract soon after it took effect. By February of 2000, the SSB notified Respondent of its intention to revoke his license for non-compliance.

Respondent requested a hearing and, as a result of negotiations between SSB and Respondent's counsel, a settlement agreement was reached. The 2000 Settlement Agreement imposed more specific requirements on Respondent's operation of Stand #97. It also required him to pay back several debts owed to SSB.

Subsequent to the 2000 Settlement Agreement, SSB continued to receive complaints about dirty vending machines, empty or nearly empty vending machines, and spoiled food in refrigerated vending machines at Stand #97. In addition, Respondent was frequently late in providing the required ledgers and other accounting information to SSB. Respondent also failed to comply with the terms of the agreement to pay off the debts he had incurred with SSB.

In December 2005, SSB entered into a Corrective Action Plan with Respondent in an effort to assure compliance, satisfy the increasingly unhappy tenants of the Whipple Building, and prevent having to revoke Respondent's license. Despite Respondent's willingness to sign the CAP, improvements in machine maintenance and filling did not improve. Ledgers were still incomplete and/or late and the debts were not being paid off.

After attempts in August of 2006, to contact Respondent and work with him to correct the problems failed, SSB sent him notice of their intention to revoke his license. He now appeals that determination.

## Argument

SSB contends that Respondent has failed to meet many of the essential conditions of his license. He has not maintained sanitary, well stocked and functioning machines. He has not complied with the established rules and practices for bookkeeping and has not paid his debts to SSB.

Respondent does not contest the facts alleged by SSB that the machines are not cleaned and maintained per rule and contract. He does not contest the allegations that the machines are frequently not full and that frequently several selections are unavailable. He does not contest the allegations that mouldy, spoiled food has been reported in the machines from time to time. Respondent does not contest SSB's contention that the Monthly Operating Charge debt and the initial inventory debt were not repaid nor does Respondent dispute that the ledgers and accounting information was frequently late, incomplete or inaccurate.

Respondent argues, however, that because of remodeling at the Whipple building, the tenant count has been down and the vending stand is not producing the income he expects. This in turn makes it difficult to afford bookkeeping help and maintenance help. The low volume also causes product to expire before it is sold, making it uneconomic to keep the machines fully stocked.

Respondent also argues that SSB must share some of the responsibility for customer dissatisfaction because it refused to train his employee on cleaning of the coffee machine and because SSB was ineffective in getting permission from GSA to give Respondent access to a janitor closet where the coffee machine parts could be better cleaned.

These arguments are not persuasive. If the sales volume is down significantly because of low tenant occupancy, an operator can request the SSB remove some machines from the stand so that the remaining machines will have sufficient volume to warrant refilling and maintenance. Respondent never provided any evidence or any accounting information that justifies the claim that the volume was so low as to be uneconomic. Respondent never requested of SSB that it remove any machines from the stand so as to make the stand more economically viable. Had Respondent taken these steps, he might have had a point. However, without adequate, accurate financial data there is no basis to determine that the stand was uneconomic. Respondent's claim begs the further question that if the stand was so unproductive, why has Respondent continued to operate the stand since 1997 without requesting any adjustment by SSB? The record is silent on this point.

While it may be inconvenient and perhaps even shortsighted to deny training to an operator's employee, the program is designed for the qualified blind operator, not for his or her sighted employee. SSB has a legitimate cost issue to



consider when weighing whether to provide training only for the qualified operator or for the employees of the operator as well. In any event, maintenance and stocking of the machines is, by rule and contract, the responsibility of the operator; not SSB.

Finally, there was no evidence introduced to show that the debts owed to SSB were paid as required by Minn. R. 3321.0700, subp. 1 and 3321.0800, or as required by the 2000 Settlement Agreement or the CAP.

## **Conclusion**

Any one of these failures to comply could have been, by itself, enough to justify termination of the license several years ago. SSB, however, tried repeatedly to work with Respondent, to give him additional training, and to give him several second chances before beginning revocation procedures. To date, Respondent has shown no inclination to change his pattern of conduct or to make the needed changes.

Minn. R. 3321.0500, subp. 2, states in relevant part; "The operator's agreement to operate a vending stand may be revoked or temporarily suspended in those instances where the operation, integrity, or reputation of the program may be damaged." In this case, the operation, integrity and reputation of the program are all being threatened by Respondents non-compliance. SSB and the blind individuals it is designed to assist stand to suffer harm as a result. The record is replete with evidence that after years of complaints the GSA is growing tired of having no improvement to the services for its building. GSA could refuse to allow SSB to operate a stand in its building if service continues to fail to comply with the permit requirements. Loss of this business opportunity would hurt the program and deny an opportunity to a potentially qualified operator who might bid for this license.

It is understandable that operating a business is difficult when one is legally blind. The program requirements, however, are designed with those challenges in mind and other blind operators comply with them. Respondent must be held to the same standard as others. In this he has failed in the particulars alleged by SSB. He has not shown that he complied with the terms of his license and SSB has demonstrated that it has good cause for its action.

**R. R. K.**